MINUTES OF THE MEETING OF THE BAR-BENCH-MEDIA CONFERENCE

A meeting of the Bar-Bench-Media Conference was held on Monday, January 14, 2008, at 12:00 noon in the Supreme Court Conference Room in the Carvel State Office Building. The members of the Conference in attendance were:

Members from the Bench:
Chief Magistrate Alan Davis (by telephone)

Members of the Bar:
Charles J. Durante, Esquire
Kimberly L. Gattuso, Esquire
Christine P. Schiltz, Esquire
Allen M. Terrell, Jr., Esquire

Members of the Electronic Media:
Peg Brickley (by telephone)
Chris Carl
John Dearing (by telephone)

Members of the Print News Media:
Elizabeth Bennett
Randall Chase

Steve Taylor of the Supreme Court and Sean O'Sullivan of the News Journal were also in attendance. Chris Carl chaired the meeting because it was the Electronic News Media's turn to chair the Conference. Chris announced that the meeting would be organizational in nature.

The first agenda item was the approval of the draft minutes from the March 12, 2007 and May 14, 2007 Conference meetings. The minutes were approved.

Under Old Business, Conference elections and memberships were discussed. Chris Carl was nominated, seconded and elected as the Conference Chair. In the Chair and Vice Chair rotation, it was the Bar's turn to supply a Vice Chair. Chris asked if there were any Bar volunteers. Kimberly Gattuso volunteered to serve as Vice Chair. She was nominated, seconded and elected as Vice Chair. As to the Electronic News Media members, Chris said that he was reappointing

Micheline Boudreau and Peg Brickley for new three year terms. As to the Bench membership, Chris pointed out that there was no member from the Court of Chancery, and he thought it would be helpful to the Conference to have a Chancery member. The Conference Constitution provides for six members of the Bench to be appointed by the Chief Justice. Traditionally, the member from the Federal Bench is not counted as an appointment of the Chief Justice. With the Conference's approval, Chris Carl agreed to write to the Chief Justice concerning the appointment of a member of the Court of Chancery to the Conference.

The next two agenda items were the proposed expansion of electronic news media coverage of trial court proceedings and the Disney Report. At Chris Carl's request, Steve Taylor gave a brief history of the Conference's proposal to expand electronic news media coverage of courtroom proceedings. Chris said that he was going to propose writing a letter to the Supreme Court as to the status of the Conference's request. However prior to the meeting, he realized that the Conference had not finalized the Disney Report for submission to the Supreme Court. The purpose of this experiment was to demonstrate to the Supreme Court that the electronic news media could cover trial court proceedings without being intrusive or disruptive. The coverage was successful according to all accounts. The Conference had delayed submitting the report to permit Greg Burton of the News Journal to add a section on the electronic news media's coverage of trial court proceedings in the New Castle County Courthouse in the Court of Chancery and Superior Court. Chris Carl and Sean O'Sullivan said that they would contact Greg to ask him to complete his section. Steve Taylor will email each Conference member copies of the draft report and the Conference's request to expand electronic news media as well as a roster of Conference members.

The next agenda item concerned formal policies regarding the release of court administrative records. Steve Taylor reported that the polices of the Superior Court, the Family

Court, the Court of Common Pleas and the Justice of the Peace Court could be found on the Bar Bench Media Conference Website on the Supreme Court's home page. The Supreme Court is finalizing its policy for promulgation. Steve said that he believed the Court of Chancery had promulgated its policy and would verify that for the Conference. Peg Brickley reported that Judge Ambro had set up meetings concerning media access to sealed documents in Bankruptcy Court. Peg said that progress was being made, but more worked needed to be done. Peg indicated that, in the future, there may be litigation on media access issues in Bankruptcy Court.

The last item under Old Business was media terminals/printers in the Court of Chancery and Superior Court in the New Castle County Courthouse. Sean O'Sullivan reported that there were media terminals for both courts, but neither court permitted printers to be attached to the terminals. Chris Carl said that this was an issue where Judge Ableman was taking the lead and that he would contact her.

Under New Business, Chris distributed a proposed amendment to the Bar Bench Media Conference Constitution. The amendment would permit members who are participating in the meeting by teleconference to be part of a quorum. Chris tabled the proposed amendment until the next Conference meeting because the Conference Constitution requires a 30 day notice period to each Conference member of any proposed amendment. The proposed amendment is attached to these minutes and will be posted on the Conference's website.

The last agenda item was future meeting dates. Chris distributed a list of proposed dates (copy attached to minutes) that indicated the dates of January 14, 2008, April 21, 2008, July 14, 2008 and October 20, 2008. Chris said that the dates were subject to change by the Conference after the members had a chance to review the dates. As a result of a question from Allen Terrell about the process of placing issues on the agenda, Chris invited all Conference members to contact

him with any issues that they wanted included on future agendas. Mr. Terrell provided Conference members with copies of an article entitled Reporter's Privilege in the 21st Century from the most recent issue of the Delaware Lawyer.

The next meeting of the Conference will be held on Monday, April 21, 2008 at 12:30 p.m. in the Supreme Court Conference Room in the Carvel State Office Building. Lunch will be provided. An agenda and draft minutes will be circulated prior to the meeting.

The meeting adjourned at 1:15 p.m.

Respectfully Submitted,

Stephen D. Taylor

January 29, 2008

SDT/dlc

# Bar-Bench-Media Conference of Delaware

**Proposed 2008 meeting dates**

Jan. 14, 2008

April 21, 2008

July 14, 2008

Oct. 20, 2008

# Proposed amendment to the Bar-Bench-Media Conference of Delaware Constitution

Submitted for review: January 14, 2008

**Current passage:**

5. Meetings

(c) A quorum for the transaction of business at any meetings shall consist of six members of the Conference present in person, at least three of whom shall be members from the bar or bench and at least three of whom shall be members from the media. Each member of the conference shall have one vote.

**Proposal:**

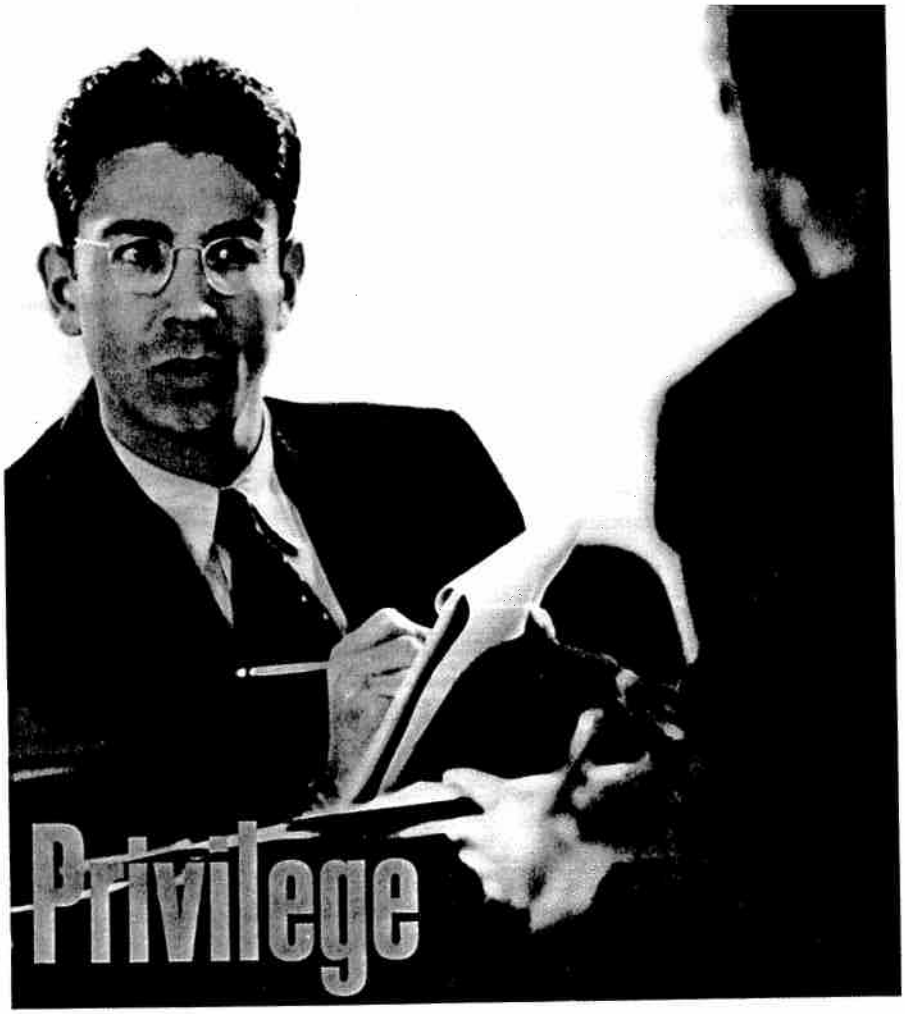
Add the words "via video-conference or via tele-conference" as such:

5. Meetings

(c) A quorum for the transaction of business at any meetings shall consist of six members of the Conference present in person, **via video-conference or via tele-conference**, at least three of whom shall be members from the bar or bench and at least three of whom shall be members from the media. Each member of the conference shall have one vote.

**FEATURE**

Jane E. Kirtley



# Reporter's Privilege in the 21st Century

Despite the ongoing controversy concerning adoption of a federal reporter's privilege statute, the idea is neither new, nor novel.

Is there any institution the American public loves to hate more than the media? Depending on your point of view, the institutional press is either irredeemably liberal or cravenly conservative, a toothless watchdog or a godless traitor, willing to do anything to sell newspapers or raise viewership ratings. News consumers marvel at the media's fixation on the latest peccadilloes of a drunken starlet or a straying senator at the sacrifice of stories that "matter."

Anyone who has been the object of media attention "knows" that reporters are sloppy, arrogant, imprecise, agenda-driven, fixated on the negative and, of course, biased. How could they be anything else, when no minimum education requirements, no licensing system, no mandatory ethics code and no disciplinary body can be used to keep the incompetents and undesirables out? And that's just the mainstream media. What about those bloggers — the infamous geeks in pajamas, spreading rumors throughout the Internet and railing at anything and everything in cozy anonymity from their shadowy basement lairs, accountable to no one?

How in the world could anyone seriously argue that these people should be granted any kind of testimonial privilege?

Well, a lot of people have made this argument for a very long time, and have made it persuasively. Despite the ongoing controversy concerning adoption

of a federal reporter's privilege statute, still being debated in Congress as this article goes to press, the idea is neither new, nor novel. Journalists have claimed the right to protect confidential sources since the Colonial era.[1] In 1896, the state of Maryland became the first to adopt a reporter's shield law.[2] Currently, 33 states (including Delaware), plus the District of Columbia, have enacted some form of statutory protection for the press,[3] and courts in all the states, with the exception of Wyoming, have recognized at least a qualified privilege, as have the majority of federal circuits.

The precise contours of the privilege vary. A few states, such as Nevada, recognize virtually an absolute privilege, protecting reporters from any kind of compelled revelation of sources or unpublished materials.[4] Most jurisdictions, however, provide only a qualified privilege to journalists. The privilege may extend to sources, unpublished material, or both.

A qualified privilege can only be overcome if all the elements of a multi-part test are met. A typical test would require the subpoenaing party to demonstrate that the information sought 1) is highly material and relevant to the underlying claim; 2) goes to the heart of the claim; and 3) is unobtainable from any other non-media source. Some tests also require a showing that the claim is viable,[5] and some states carve out an exception if a news organization is the defendant in the underlying lawsuit.[6] Notably, several courts have ruled that the privilege belongs to the journalist, not to his source, and therefore cannot be waived by anyone other than the reporter.[7]

Accordingly, the absence of a federal reporter's privilege is the anomaly, rather than the rule. But some say 49 states (and the District of Columbia) are misguided or mistaken. Just because a policy has been in place for more than 100 years doesn't make it justifiable.

The Supreme Court of the United States must be counted among the skeptics. Given an opportunity to recognize a constitutionally based privilege in 1972, the high court declined to do so, at least on the facts presented in four consolidated cases, all involving situations where reporters had witnessed criminal activity and were ordered to testify about it before a grand jury.[8] The 5-4 decision, authored by Justice White, although acknowledging that gathering news enjoys some First Amendment protection, observed that the Constitution does not "confer[ ] a license on either the reporter or his news sources to violate valid criminal laws. ... Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial."[9] Reporters, in other words, are not above the law.

**All the states, with the exception of Wyoming, have recognized at least a qualified privilege.**

But as the dissenters observed, such a policy is not without consequences. Justice Stewart predicted that the majority's ruling would "invite[ ] state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of the government."[10]

And "annex" them, they have — or at least, attempted to — many times, in the 30-odd years since *Branzburg*. As the Reporters Committee for Freedom of the Press has documented since 1990, both print and broadcast news organizations are served with thousands of subpoenas seeking notes, tapes, drafts, photographs and testimony every year,[11] despite the existence of state shield laws, judge-made law, procedural and evidentiary rules,[12] as well as internal guidelines, adopted by the Department of Justice in 1970, which were intended to balance the First Amendment interest against the need for effective law enforcement by requiring prior approval from the attorney general before issuing a subpoena to the news media.[13]

Since 1972, lawyers representing the news media have fought back against the dismal pronouncement from the high court, with a surprising degree of success. In the years following *Branzburg*, most state and federal courts, relying in large part on Justice Powell's "enigmatic concurring opinion,"[14] which emphasized the limited nature of the majority ruling, declared that a constitutional or federal common law privilege did exist, at least in other contexts, such as civil or criminal trials. Reporters occasionally went to jail for refusing to cooperate, but this was rare and always controversial.[15] The Supreme Court has yet to revisit the question.

Then, in the early years of the 21st century, federal judges in the several circuits began to question the wisdom of recognizing a privilege. Notably, Seventh Circuit Judge Richard A. Posner, scorning what he characterized as an "audacious" argument that *Branzburg* created some kind of constitutional privilege, wrote that, "We do not see why there needs to be special criteria merely because the possessor of the documents or other evidence sought is a journalist."[16]

Posner's opinion, although construing a case that did not involve confidential sources, lit the slow fuse that would explode what some had come to regard as the "myth" of a constitutionally based reporter's privilege.[17] What came to be

known as "the Judith Miller case," arising from the decision of a then-*New York Times* reporter to defy a subpoena issued by a grand jury investigating the unauthorized disclosure of the identity of CIA operative Valerie Plame, prompted the federal courts in the District of Columbia to reexamine the scope of the privilege and to conclude that none existed, at least in these circumstances.[18] Miller spent 85 days in jail before agreeing to testify after her source released her from her promise of confidentiality.[19]

The house of cards threatened to collapse in other cases as well. Some arose in criminal proceedings, either seeking journalists' eyewitness observations of criminal activity[20] or demanding that they reveal the identity of sources who had provided unauthorized access to information sealed by court order.[21] Others involved civil lawsuits brought against the federal government by individuals who claimed that their personal information was leaked to the media in violation of the law.[22]

Although the ethical conduct of the press had been called into question in these cases, the media were not the defendants or the "targets" in any of them. In each instance, the subpoenaing entity claimed that it sought the journalists' testimony not to punish the media, but rather to uncover the true violator of the prohibition against disclosure — whether that was the Privacy Act,[23] the Intelligence Identities Protection Act[24] or a judge's sealing order — thereby effectively eliminating any possibility that the reporters could assert the Fifth Amendment as grounds for refusing to testify.

In each instance, the federal courts were implacable, ruling that the journalists had no constitutional basis for refusing to testify "just like anyone else." Blogger Josh Wolf spent 226 days in prison after he resisted a grand jury subpoena seeking raw videotape he filmed at a G-8 protest in July 2005.[25] In order to protect their confidential sources, five media organizations agreed to pay an unprecedented $750,000 to nuclear scientist Wen Ho Lee as part of the government's settlement of Lee's Privacy Act lawsuit.[26]

Faced with the prospect of jail, fines or both, the news media reluctantly concluded that the time had come to turn to Congress for a remedy. Reporter's shield bills were introduced in the House and Senate, with bipartisan sponsorship, most recently on May 2, 2007. They bear the short title "The Free Flow of Information Act," and would protect journalists from being forced to reveal confidential sources in the majority of situations and would create a qualified privilege for news gathering materials that would not disclose a confidential source.[27] Exceptions would include situations where disclosure was necessary to prevent "an act of terrorism" or other

significant harm to national security, imminent death or significant bodily injury, or to identify who had disclosed trade secrets, or personal or financial information protected by certain federal laws.

The drafters of the bills struggled to describe exactly who would be a "journalist" covered by the statute. Attempts to craft the definition in terms of institutional affiliation met with howls of protest from the blogosphere. Adopting a "functional" approach, the bills define a "covered person" as one who is "engaged in journalism," which is further defined as "the gathering, preparing, collecting, photographing, recording, writing, editing, reporting or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public."

The bills have been vigorously opposed by the Justice Department, whose representative testified at a hearing in June 2007 that they would protect unauthorized leaks and disclosure of sensitive information, as well as threaten national security. Justice has also asserted that the bill's definition of "covered persons" who could invoke the law would include "a terrorist operative who videotaped a message from a terrorist leader threatening attacks on Americans, because he would be engaged in recording news or information that concerns international events for dissemination to the public."[28]

According to the *San Francisco Chronicle*, House Judiciary Committee Chairman John Conyers (D-Mich.) dismissed that assertion as "totally absurd."[29] Nevertheless, opposition to the bill in some quarters remains strong, at least in part because of lawmakers' deference to the Justice Department's concerns.

But even assuming that a federal shield law could be drafted that Justice could live with, would it be good public policy to recognize a privilege for journalists?

Professor Geoffrey R. Stone argues that testimonial privileges "promote open communication in circumstances in which society wants to encourage such communication."[30] Privileges such as attorney/client, doctor/patient and priest/penitent exist because our society recognizes that without confidentiality, these communications would be inhibited, and on balance, the cost to the legal system by losing the information is outweighed by other compelling interests.[31]

But opponents argue that equating these relationships with that of a journalist and her source is faulty. Unlike these other professionals, a reporter is not licensed, and is not subject to any kind of regulatory authority. Most news organizations and the major voluntary press associations, such as the American Society of Newspaper Editors and the

Society of Professional Journalists, have adopted ethical codes or guidelines.[32] But many of these are aspirational in nature, and even if a journalist were to violate a particular employer's code and lose his job, nothing would prevent another organization from hiring that individual the next day.

So, do journalists "deserve" to have a privilege? The better question would be: Does society deserve to have a journalist's privilege?

Stories ranging from Watergate, the Enron scandal, abuse at Abu Ghraib prison and conditions at Walter Reed Army Medical Center depended, at least in part, on confidential sources. They all reported things than some powerful entity did not want the public to know about. Common sense tells us that if journalists cannot promise their sources confidentiality, sources will be reluctant to speak with them. Without information, knowledgeable debate will suffer.

The role of the press is critical to maintaining our democratic system. Although it may be expedient to compel reporters to comply with subpoenas, "just like anybody else," as Justice Douglas noted in his dissenting opinion in *Branzburg*, "The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know."[33] Journalists play a unique role in fulfilling that right. For them, "good citizenship" means remaining independent. Surely there can be no more "compelling" interest than that. ◆



FOOTNOTES

1. *See, e.g.*, Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 Minn. L. Rev. 515, 533-4 (Feb. 2007)

2. Md. Code Ann., Cts. & Jud. Proc. § 9-112 (2007).

3. The other states are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee and Washington.

4. Nev. Rev. Stat. Ann. § 49.275 (2006).

5. *See, e.g.*, *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980).

6. *See, e.g.*, Minn. Stat. Ann. § 595.025 (2006).

7. *See, e.g.*, *U.S. v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980); *State v. Boiardo*, 416 A.2d 793 (N.J. 1980).

8. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

9. *Id.* at 691.

10. *Id.* at 725.

11. *See* Reporters Comm. for Freedom of the Press, *Agents of Discovery*, 2003, http://www.rcfp.org/agents/index.html

12. *See, e.g.*, Fed. R. Crim. P. 17 ( c); Fed. R. Civ. P. 26 ( c); Fed. R. Evid. 501.

13. 28 C.F.R. §50.10 (2006).

14. So characterized in Justice Stewart's dissenting opinion in *Branzburg*, *supra* note 8, at 725.

15. *See* Reporters Comm. for Freedom of the Press, *Paying the Price: A Recent Census of Reporters Jailed or Fined for Refusing to Testify*, http://rcfp.org/jail.html

16. *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003).

17. *See, e.g.*, Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege*, 24 Cardozo Arts & Ent. Law J.385 (2006).

18. *In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141 (D.C. Cir. 2006).

19. *See* Susan Schmidt and Jim VandeHei, *N.Y. Times Reporter Released from Jail*, Wash. Post, Sept. 30, 2005, at A01.

20. *In re:* Grand Jury Subpoena, Joshua Wolf, 201 Fed. Appx. 430 (9th Cir. 2006).

21. *See, e.g.*, *In re* Special Proceedings, 373 F.3d 37 (1st Cir. 2004) (WJAR-TV reporter Jim Taricani); *In re* Grand Jury Subpoenas, 438 F. Supp.2d 1111 (N.D.Cal. 2006) (*San Francisco Chronicle* reporters Mark Fainaru-Wada and Lance Williams).

22. *See, e.g.*, Lee v. Dep't of Justice, 413 F.3d 53 (D.C. Cir. 2005); *Hatfill v. Gonzales*, 2007 U.S. Dist. LEXIS 58520 (D.D.C. 2007).

23. 5 U.S.C. § 552a (2006).

24. 50 U.S.C. § 421 (2006).

25. Wolf was released after he posted all of his footage on his personal Web site and signed an affidavit swearing he did not see and could not identify individuals who committed the underlying crimes being investigated. *See*, Bob Egelko and Jim Heron Zamora, *Imprisoned freelance journalist released*, Sfgate.com, April 3, 2007, at http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/04/03/BAGLRP0PAP4.DTL

26. *See* Paul Farhi, *U.S., Media Settle with Wen Ho Lee, News Organizations Pay to Keep Sources Secret*, Wash. Post, June 3, 2006, at A01.

27. H.R. 2102, S. 1267 (Free Flow of Information Act of 2007).

28. *Hearing Before the House Comm. on the Judiciary Concerning H.R. 2102, the Free Flow of Information Act of 2007* (June 14, 2007) (statement of Rachel L. Brand, Assistant Attorney General, Office of Legal Policy) http://www.usdoj.gov/olp/pdf/hr2102_brand_hjc_061407.pdf

29. John Diaz, *"Code Orange" for press freedom*, S.F. Chron., July 15, 2007, at D-6.

30. Geoffrey R. Stone, *Why We Need a Federal Reporter's Privilege*, 34 Hofstra L. Rev. 39 (Fall 2005).

31. *Id* at 40.

32. *See, e.g.*, Society of Professional Journalists Code of Ethics, http://www.spj.org/ethicscode.asp; American Society of Newspaper Editors Statement of Principles, http://www.asne.org/kiosk/archive/principl.htm. The ASNE website also provides links to many other media ethics codes at http://www.asne.org/index.cfm?id=387.

33. *Branzburg*, *supra* note 8, at 721.